The Post Office and their lawyers: an extraordinary orthodoxy

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The Post Office scandal is extraordinary. Shocking. Hundreds were falsely convicted, thousands were stripped of cash and livelihoods, reputations ruined, and families broken apart. For them, ill-health, including severe mental health problems, is more virulent than Covid. Several have killed themselves through shame or depression. Others struggle on, in quite extraordinary pain. Their minds and bodies literally bear the scars.

And lawyers are at the heart of this. Not solely but significantly and perhaps substantially responsible. But the point I want to make in this talk is that, as extraordinary and egregious as the consequences of this story are, lesson number one is that, in important ways, what we see, is a kind of professional orthodoxy at work, an extraordinary orthodoxy.

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Zeal. Secrecy. Truth. Abused in the service of reputation and the interests of the client. This is the inverse of lawyers much-lauded fearlessness. It was a kind of cowardice, which the Post Office almost perfected as, extreme as it sounds but accurately I think, a kind of legal-corporate totalitarianism.

It poses the question, how typical are the problems we have seen? How common beyond the Scandal itself. Rather than having a legal compensation culture, might we have its opposite, a corporate-legal cover-up culture?

Many of us will have looked at Sir Brian Langstaff's report on the Infected Blood Scandal.[2] His terms of reference include whether there was a "cover-up".

> "A better expression, conveying what happened is "hiding the truth.
>
> "Hiding the truth includes not only deliberate concealment but also a lack of proof" line; and failing to tell people about the risks inherent in treatment or the alternatives to that treatment…"

Deliberate concealment, a lack of candour, the retelling of half-truths, and the massaging of risk. Do these problems feel like they are an anathema to, or in the DNA of, the legal profession? And how does that DNA interact with the clients for whom they act?

Rather than conducting a detailed thematic analysis of these problems, tonight I am going to outline the story of the Post Office Scandal.

[2] https://www.infectedbloodinquiry.org.uk/news/inquiry-report-published

My central point will be that lawyers are responsible for, not alone but sometimes inviting, the abuse of law that constitutes the Post Office scandal. I will set the lens wide and give you a feeling for how lawyers have been involved front to back. And then I will focus on a central thread of recent evidence before the Inquiry.

I will examine what patterns in recent evidence seems to reveal about the response of so many lawyers that touched the cases on the Post Office side.

Because those patterns are repeated, repeated across time and all levels of the profession, it suggests an orthodoxy. Zealous interpretation of facts and law in ways that suit the interests of clients stretched beyond propriety. By clients interests, I mean their professed or assumed interests, their short term interests. It is an attitude of not what *should* we say but is it *expedient* to say or what *can we get away with* saying?

And with this comes a particular approach to adverse evidence. Or, as we now tend to see adverse evidence in the Post Office case, the truth. To adverse evidence there is a consistent response: deny, contest, contain, and conceal. Do not, I repeat *do not*, investigate. And if you do investigate, to echo words attributed of PO Chair Alice Perkins, have someone man-mark that investigation for you.

Under this orthodoxy, zeal and containment can act as poisonous logics within organisations. They allow organisations to delude themselves and others. They support poor, short-term decision-making, and, ultimately, they can foster deceptions.

Now, tonight, I want to speak as plainly as I can about what has gone wrong without arriving at final judgments on the individual

lawyers involved. I am not saying that any individual has committed misconduct or a crime, nor am I excusing anyone of it.

In talking of an orthodoxy. I am illustrating the line that some, but I hope not many, lawyers walk and showing the ways that some, but perhaps not all, may have strayed. And I have generally avoided some of the most egregious examples of misconduct in favour of the most interesting ones: those straddling the boundary between lawyers being lawyers and lawyers being unprofessional.

I will return to that line-walking at the end and raise a couple of questions specifically for Scottish institutions.

So let's begin by taking you through the Scandal. Lawyer involvement in the Scandal spans years. It spans private practice and in-house practice. Solicitors and barristers. GCs and KCs. It takes in junior lawyers and senior lawyers including at least one senior former judge.

There are four main phases running from 1999 to the present day.

First, the Post Office set up unfair contracts. Those contracts defined sub-postmasters as agents, obliged them to accept weekly statements as accurate even if they were not, and provided various ways of enforcing the debts (called shortfalls). This is what I had in mind when I spoke of legal totalitarianism. The contracts were one-sided, and managed unfairly. Mr Justice Fraser's in the Bates group litigation found the contract unfair in law and in its operation and the POs pursuit of civil debts oppressive.

The second stage is the most famous one. Shortfalls were recovered through often egregious means. If shortfalls built up, or were unpaid, PO sued, contracts were terminated, and prosecutions often followed.

This was a relatively efficient means of recovery through confiscation and compensation orders as well as plea deals based on repaying the money and keeping quiet about Horizon. About 200 people are thought to have gone to jail.

Prosecutions stopped in 2013 (later it seems in Scotland) but it was not until 2021 that the Court of Appeal found prosecutions in Hamilton an affront to the public conscience.

Prosecutions were based on insufficient evidence. Prosecutors overcharged, they failed to make material disclosures. PO pressured admissions and guilty pleas inappropriately and so on.

Phase 3 is what I call the containment phased. It involved legal and PR personnel in the defence of Horizon, and the prosecutions under it, when problems began to emerge.

This began in earnest 2009, about 10 years after the start of the Horizon system. It picked up pace considerably in 2013 when a great deal of public noise about Horizon was matched by a cacophony of private noise, incoming expert reports and other indicators telling the Post Office they had a problem.

In fact, they had two problems:

- Horizon was not as robust as they thought or pretended, and
- their prosecutions were, in the words of critical legal advice, potentially “profoundly flawed”.

It is events during this central period which I will concentrate on later. For now I want to frame it as posing one question. How do lawyers help businesses respond when faced with a challenge central to their reputation and financial interests? Their accounting system might be flawed. Their legal work might have been unsafe. What should they do? And I want to emphasise the contingency: the system and prosecutions *might* be flawed.

What should they do in situations of some doubt?

Should they investigate? Or should they deny, contest, contain, conceal? Should they investigate or ignore? What should a responsible business do? What should responsible lawyers advise the business to do? What is the relationship of what they do to the truth as described by Sir Brian Langstaff?

Whatever our personal answer to these questions, we will see in a little while the orthodoxy as demonstrated by the lawyers in this case.

For now, all we need to know is that Paula Vennells appeared before the Business Select Committee in 2015 to tell them there was no evidence of miscarriages of justice. And afterwards she wrote to a government minister, “Through our own work and that of Second Sight we have found nothing to suggest that any conviction is unsafe.”

We have found *nothing* to suggest *any* conviction is unsafe.

Whether she knew it or not, that claim was palpably false. We now know she blames her lawyers, rightly or wrongly, for that falsity. And because of how they worked, a point for another day, she might succeed in her defence

Phase 3 ended with a failed mediation scheme. It was chaired by Sir Anthony Hooper. He was a former Court of Appeal judge. Behind closed doors he told Paula Vennells, that he thought the SPMs were probably honest and Horizon probably flawed. My assessment of the mediation scheme is that Post Office lawyered up and took an attritional approach to the mediation hoping to pay only token damages. The collapse of this strategy led to the Bates litigation.

Phase 4 was the Group Litigation where a significant part of, but nowhere near all of, the Post Office's wrongdoing was exposed.

In that case Mr Justice Fraser described the Post Office Group litigation defence as based on, “bare assertions and denials that ignore what has actually occurred…It amounts to the 21st century equivalent of maintaining that the earth is flat.”

He said the tactics were excessive, egregious, littered with disclosure flaws, as well as misleading evidence and pleadings.There was a notorious recusal application where Lord Grabiner KC is said to have tried to intimidate the judge with the opinion of an undisclosed senior legal figure. This senior figure, we now know, was Lord Neuberger. A former President of the Supreme Court, he had advised unhindered by traditional strictures against retired judges advising on cases before the courts.

The application failed. The Court of Appeal judge who reviewed it said the application was “without substance”, “misconceived”, and “particularly egregious… …significantly misrepresenting the case”. And he said, “the mere making of these applications could have led to the collapse of that sub-trial altogether.” If Neuberger and Grabiner had won that moment for the Post Office this most egregious miscarriage of justice may have laid hidden forever.

The tactics in Bates that were designed to exhaust the patience of the claimants funders and lawyers, forced humiliation on the Post Office flat earthers but also settlement on the SPMs. That settlement has now been reopened by compensation schemes which may exceed a billion pounds.

Phase 5 is the aftermath. Bates led to the CCRC launching the Hamilton appeals and the compensation schemes. During these, I would argue, the PO has continued to mount something of a rearguard.

The Inquiry has produced a series of extraordinary revelations.

And the unparalleled Post Office (Horizon System) Offences Act has been passed, quashing hundreds of convictions, but still – in the manner of this story – leaving justice only partially done; here in Scotland but also for others.

In Phase 6 we will see who might be prosecuted or professionally disciplined.

I am not going to run through each phase. I want to focus on how the lawyers at various points, years apart, and particulary those not employed by the Post Office, responded to the central challenges posed by:

1. Problems with Horizon and
2. Problems with the propriety of prosecutions

We begin with Lee Castleton's case in 2006. Lee was sued for shortfalls under Horizon having been removed from his branch.

Richard Morgan (now KC) the barrister who lead the case against him decided to adopt a legal strategy that avoided the need to prove that Horizon was robust.

He did so for interesting reasons, based on arcane but plausible arguments about agency law. But it was also the cleanest and easiest way of proving the debt. He knew proving complex systems were foolproof was hard. Far better to put all the evidential burden on the opponent (who by trial became a litigant in person).

Told of a bug in the days leading up to trial that he thought he probably needed to disclose, he persuaded the judge that it was inappropriate to call evidence from other Post Offices. That relieved him of the burden of disclosure. Lee Castleton lost.

The legal costs of £320k bankrupted him. If I tell you how it affected him and his family, I will, in all likelihood, struggle to carry on.

Mr Morgan was asked if it was appropriate to run a case on the presumption that Horizon accounts were sound, given the risk of flaws. He said it was simply the easiest way of winning. He had asked questions about the reliability of Horizon early on and had not had answers, so he felt able to run the case.

Asked how he dealt with uncertainties about Horizon he said:

> A. …I'm trying to find out what's going on. …without being so crude as to say "Give me full and frank disclosure", I want to know are there any unexploded landmines that I'm going to step on if I go down a particular course? Is there anything that's going to come out that I should know about now? Generally, with sophisticated firms of solicitors, they know that that's what you're asking them when you say, "What's out there?"

We do not really get a satisfactory answer to what a sophisticated solicitor understands when being asked, *What's out there*?

We know also that, Mr Morgan is asked at conference, much later, in 2012, when claims on Horizon appear to be burgeoning, whether the Post Office should have an independent investigation into Horizon.

He appears to say, No.

The note of the conference, which may be his advice or a collective view, says.

> Whatever the findings of the expert report it [will] not resolve the problem. POL will be "damned if they do and damned if they don't". If the findings are that there are no issues with Horizon people will see that as a "whitewash" whereas if the findings are negative that will open the floodgates to damages claims by SPM's who were imprisoned for false accounting and Access Legal will start to pursue all the civil cases they are currently sitting on.

The problem is making cases go away for Post Office; not the potential for substantial injustice to have occurred.

Let me shift now to 20th October 2011, Royal Mail Group (which then contained Post Office) had received four letters of claim from the Justice for Sub Post Masters Alliance.

A Royal Mail Group lawyer issued a litigation hold. Her email tells Post Office executives and lawyers to preserve all documents that might be relevant. It also talks about, “Document creation”:

> It is very important that we control the creation of documents …which might be potentially damaging to POL's defence… as these may have to be disclosed …. Your staff should therefore think very carefully before committing to writing anything relating to the above issues which is critical of our own processes or systems…

"Where it is necessary to create such a document," she says, in certain circumstances, it will be possible to claim privilege over the document and resist disclosure. She goes on to explain the legal tests that apply to attract privilege.[3]

In providing various ways of hiding information from the other side she suggests, for instance:

> If the dominant purpose of the communication is not to obtain legal advice, try to structure the document in such a way that its dominant purpose can be said to be evidence gathering for use in the litigation;

She also encourages them, amongst other things, to mark every such communication "legally privileged and confidential" and "Where possible and appropriate, copy a member of Legal Services into the communication [making clear] …you are doing so to enable them to advise on the content.

> If in doubt, call Legal Services before committing anything to writing which relates to these issues and contains critical wording.

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[3] As litigation is now a distinct possibility, the document will be privileged if its dominant purpose is to give/receive legal advice about the litigation or to gather evidence for use in the litigation. This also applies to communications with third parties - i.e. with other organisations - provided they are confidential and their dominant purpose is as set out above. All of the following steps should be taken in order to maximise the chances of privilege attaching to the document:

Litigations holds and maximising the protection provided by legal privilege are orthodox. The justification is it maximises the client's rights to protect privileged information and lawyers can (but may not) undo the damage afterwards when they review documents for disclosure.

That right, according to this lawyer's draft, appears, arguably, to include making synthetic claims to legal privilege.

Let me turn now to the three most central pieces of bad news that the PO has to deal with. These all arose in 2013.

First, some background.Gareth Jenkins was an architect of the Horizon system. He worked for Fujitsu. He also gave evidence in criminal prosecutions for the Post Office as a supposedly independent expert. One such case was Seema Misra. Mrs Misra was sentenced to prison in 2010 for theft after a trial where Gareth Jenkins gave evidence.

Literally days before her trial a bug in Horizon Online became apparent that Mr Jenkins worked on. Jenkins did not disclose it whilst giving evidence in Misra's trial.

Why Jenkins did not do this appears never to have been investigated.

One argument in his favour might be that the bug could be said to be irrelevant. This would be because it related to a version of Horizon introduced in 2010, Horizon Online. When Seema Misra was said to have stolen money, she was using the pre-2010 version of Horizon called Legacy Horizon.

Of course, bugs in the new and improved Horizon Online in 2010 might suggest bugs were possible in legacy Horizon pre 2010 and the non-disclosure is one of many reasons for thinking Jenkins had not discharged his duties as an independent expert witness.

This all became relevant because of Second Sight. Second Sight were forensic accountants investigating for Post Office at the behest of Parliamentarians. By the end of June 2013, they had found two bugs Post Office had never disclosed. They were about to publish this in their Interim Report. Parliament and the press would pick it up.

When the solicitors firm prosecuting cases for the Post Office, Cartwright King, heard about this, it caused a panic. They had a Horizon Prosecution that was about to go to trial on the 1st of July.

Their in-house counsel, an experienced barrister, Mr Simon Clarke, realised quickly they had a potential problem with their expert. He told the Inquiry his immediate reaction was:

> You can't go anywhere from that other than to say "Well, how? Why? Who told them?" because your duties as a prosecutor are so absolute in those circumstances that any competent barrister is going to say, "Well, stop. We have to see what's going on here".

A call with Gareth Jenkins was set up for the next day. It is an interesting indication of the mood at the time that it was covertly recorded and transcribed. During the call, Mr Jenkins confirms he knew about the two undisclosed bugs but also that they are not relevant to their forthcoming case. He is also asked, how can they be sure they have identified all the bugs that exist, and that Horizon is infallible? And he replies that you can never say there are no more bugs in a system.

Clarke's worry deepens.

On 1 July, after the trial they are working on is adjourned on a doubtful basis, Mr Clarke advises in writing that he required, “a face-to-face conference with Gareth Jenkins upon publication of the Second Site report.” It was published a few days later, yet that face to face meeting seems never happened.

What Clarke did was check previous statements where Jenkins had said, in essence, that Horizon was error-free and wrote strong advice saying Post Office prosecutions past, present, and future may be profoundly flawed by the unreliable evidence given by Mr Jenkins.

Jenkins was damned without anyone speaking to him. PO are told they should not rely on him in criminal cases ever again and they need to get a fresh expert.

Failure to investigate aside, this sounds like proper, independent lawyering. But it is worth noting that what follows undoes much of the good work done here.

- The subsequent review of prosecutions by Cartwright King only considers the disclosure of two documents.
- Those documents do not disclose Gareth Jenkins knowledge of the bugs.
- No disclosure is made of the call transcript between Cartwright King and Jenkins.
- No consideration is given to what documents underly Jenkins's knowledge of the two bugs nor whether it was the tip of an iceberg.
- And Mr Clarke’s assessment of Gareth Jenkins as unreliable is not disclosed. That is disclosable, as Clarke admits in the Inquiry.

Of his failure to get an explanation from Jenkins, Clarke says he cannot explain it other than it being a desire to look forward not back.

It is put to him that he did not do it because he realised his firm had messed up and had a serious conflict of interest. He denies this but his close colleague, it seems, did know of the problem.

There is evidence he could have and should have spotted the problems: some of the problems were, it seems, clear on the face of the experts' witness statements that Simon Clarke reviewed. And he admits noticing immediately their independent expert was also an employee of Fujitsu, which might suggests he thought he should not have been instructed as an expert.

He also says he noticed some defensiveness from the Post Office about their expert evidence and a lack of surprise when about these two bugs being discovered. We now know that some in the Post Office, including probably some of their lawyers, had known about them for years.

Beyond these particular failures, lots of other examples are put to Mr Clarke in his evidence about decisions refusing or limiting disclosure that are unfair or wrong and or, when dislcosures *were* made, lacking in candour. This includes questions about disclosure to the Criminal Cases Review Commission. On the CCRC point, he resisted the criticism as unfair but largely he accepts, albeit with hindsight and without admitting any impropriety, that his decisions and behaviour fell short.

One particularly important matter relates to shredding.

The man who ran Post Office investigations, John Scott, was alleged to have issued instructions to shred minutes of disclosure meetings set up on Clarke's advice. Clarke issued a strong advice, saying if the problems continued, the Post Office would be committing professional misconduct and criminal offences.

His advice lay unaddressed, “in a drawer”, for a fortnight. But Clarke says he was reassured in ways he cannot remember clearly that the matter had been dealt with. Thereafter, all communications about the problem seem to refer not to shredding but to “cultural issues” that have been “addressed”.

As far as we know, no one investigated or established the status of the missing documents. And there is no contemporanoues evidence in writing about what had happened.

The problem lay hidden until 2020 when it was disclosed during the criminal appeals.

It is a mark of the orthodoxy that, in essence, the same mistakes Simon Clarke makes are often made by Brian Alman KC.

Carwright King were instructed to review all prosecutions conducted for the Post Office (usually by them). They were marking their own homework. Mr Altman was asked to review their review.

He took up the Post Office work almost immediately he ceased being Senior Treasure Counsel. He advised many times over the years between 2013 and his leading of the Post Office team on the Hamilton appeals.

In 2013, at the start of his review, he wrote he would have to consider carefully seeing Mr Jenkins. He wrote then that:

> Not meeting and hearing him, where there may be questions potentially impacting on non-disclosure by him and his role as an expert, risks exposing the final report to criticism.

In fact, rather than meet him, Mr Altman decided to take him *out* of his terms of reference and not see him. In the end, he says he did not investigate because he wasn't conducting an investigation. He did not advise Post Office to investigate because he saw himself as simply advising on the impact of Mr Jenkins' failure.

The trouble was, of course, he was advising on the impact of a failure he should have known he did not understand.

Counsel to the Inquiry, Jason Beer KC picks away at the plausibility of this by digging into what was missed by not investigating.

He suggests removing Jenkins from his terms of reference meant the issue "remained shelved …never to be returned to?" Beer says, "You were given the opportunity to self-define what you are asked to advise on?" Altman is unable to take it further, "you're right, I was, that's [I was only advising on impact is] the only answer I can give you." And when asked, "weren't you not loading the dice by excising him in this way." Altman replies, "I don't see it that way."

Altman also concedes that defendants were not informed that Jenkins was regarded by both him and Simon Clarke as tainted and had wrongly withheld knowledge of bugs. He cannot explain why:

> -- if I had applied my mind to the fact that Gareth Jenkins' credibility was in issue and his assessment as an expert was in issue, I think I would ultimately have advised that that ought to be disclosed in appropriate cases. I clearly didn't. I can't think now why I didn't. I'd like to say it was a misjudgement but I'm not even sure there was a judgement. I don't know why, I think we were – if I have to think back and speculate, I think the focus was so geared towards these two new bugs that that just slipped thorough, as it were.

I would say too that there were a whole host of red flags in the Cartwright King review and yet Mr Altman provides advice which, whilst noting points for improvement, says the review of prosecutions was “fundamentally sound”.

We know now, of course, it was anything but.

His self-denying ordinance on Jenkins meant a raft of problems were not discovered. This included much wider prosecutorial misconduct and how deep within the organisation, and how close to the lawyers, it went.

He says, “I don’t think it crossed my mind that it went wider than Gareth Jenkins.” However, he was also taken to evidence he raised at the time of the possibility that Post Office had been, “manipulating its prosecutorial function in order to embark on debt recovery.” These issues were not followed up for reasons he cannot explain although he seems to suggest it may be associated with Bond Dickinson being involved. These were the sophisticated managers of evidence Richard Morgan referred to in Lee Castleton’s case.

Let us now turn to them.

The first example dates from 2016. It is an email, ten years later than Castleton’s case, and involving different personnel in that firm. This email has yet to be published but it has been quoted in the Inquiry transcript.

In 2016 Amy Prime, a newly qualified solicitor at Bond Dickinson, emails Rodric Williams (a solicitor in the Post Office) on a request for disclosure. Amy’s email, we are told, was reviewed and contributed to by partner Andrew Parsons. He basks for two days in the Inquiry’s gaze soon.

Ms Prime's email says Freeths [the claimant solicitors} have requested the Post Office's Investigation Guidelines. She says they have not provided them already because "we wished to confirm whether the documents were covered by privilege." They have been so confirmed and, "as such," she says, they will, "have to be disclosed."

One of these documents, she points out, contains a statement their opponents will use to say the Post Office used stock answers to deflect the raising of Horizon defences during investigations. Furthermore, she says it could be spun to show that Post Office was not taking issues with Horizon seriously and were trying to ignore any issues which were raised. Then, she sets out Bond Dickinson's proposed approach:

> "Although we may face some criticism later on, we are proposing to try and suppress the guidelines for as long as possible on the grounds that the most recent version is not relevant since it post-dates the investigations complained of and it would require a full disclosure exercise to piece together all historic revisions of the guidelines. We thought it would be best to bring this to your attention early.
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> "For now, we'll [try] what we can to avoid disclosure of these guidelines and try to do so in a way that looks legitimate. However, we are ultimately withholding a key document and this may attract some criticism from Freeths. If you disagree with this approach do let me know. Otherwise, we'll adopt this approach until such time as we sense the criticism is becoming serious.

We will suppress disclosure, in a way that looks legitimate, unless you disagree. Not only is the strategy, well, let's say highly questionable, it generously gives the Post Office, deliberately or accidentally, a degree of deniability. Rodric Williams says to the Inquiry he does not now recall reading it carefully.

I will let you judge whether this handling of the evidence is sophisticated or not.

One last example before I offer some conclusions. This example brings us deeper into the Bates case.

The final hearing in the Bates case was in 2019. Gareth Jenkins, the witness said to be unreliable, whom Simon Clarke had told the Post Office they must not use in criminal cases, was relied on in that case.

He did not give evidence. Instead, he provided information to witnesses called by the Post Office to incorporate into their evidence to establish Horizon's robustness.

Although not all witnesses disclosed fully how far Jenkins was a source of their information, his use as a sort of shadow witness came to the attention of the claimants and the court.

We should remember that, at this stage, no one outside of the Post Office and its legal team knew that Mr Jenkins was regarded (fairly or unfairly) as a tainted, unreliable, potentially perjurious witness.

Due to the interest, leading counsel for the Post Office's closing submissions explained they had not called Jenkins. These reasons included:

> 144.1 Taking into account that [the claimants' expert] evidence specifically addressed things said or done by Mr Jenkins in relation to the Misra trial, Post Office was concerned that the Horizon Issues trial could become an investigation of his role in this and other criminal cases.

[144.2] If they are generally called first-hand evidence of this kind, they would have had to call many more witnesses than the trial timetable could accommodate. How considerate of them. And:

> 144.3 Furthermore, so far as Post Office was aware, the relevant parts of Godeseth 2 [who relied on Jenkins] were most unlikely to be controversial. For example, the Misra trial was a matter of public record, the four bugs were covered by contemporaneous documentation and Post Office had no reason to doubt Fujitsu's account of the documents it held."

Whilst Rodric Willaims sought to bluster his way around this when giving evidence, Sir Wyn Williams pointed out the crucial information that was missing:

> Sir Wyn Williams: **...But the reason he was not called was because the view was taken that his credibility had been irretrievably lost.**

The Inquiry seems to lean to the view, now at least, that it was an attempt to mislead the High Court.

The evidence so far suggests that the submission was drafted by leading counsel to the Post Office. He will be giving evidence soon. We do not know what his knowledge of the Jenkins problem was, or how it was represented to him by the Post Office and their solicitors. This is what we do know:

> A conference was held in September 2018 to discuss whether to rely on Gareth Jenkins as a witness at the Horizon Issues Trial.

> I [Rodric Williams] attended that conference, along with counsel for the Horizon Issues Trial, Anthony de Garr Robinson [Queen's Counsel] and Simon Henderson of counsel, Simon Clarke and Martin Smith of Cartwright King and Andy Parsons of [Womble Bond Dickinson].
>
> As can be seen from [an email], there was a concern about using Gareth Jenkins as a witness in the Horizon Issues Trial given his previous role as a prosecution witness, and Simon Clarke's advice to [the Post Office] was that his credibility as an expert witness had been 'fatally undermined'."

The Inquiry has not been able to find a written record of this rather crucial conference. It appears to be another questionable decision, taken to minimise and contain the Post Office's problems, in ways that the lawyer will struggle to recall and justify, but will say was taken for reasons that may have been mistaken but were entirely proper.

Conclusions

What common features and themes emerge from these examples?

One is legion mistakes that the lawyers cannot now defend. They have said these were honest incompetencies, or poor calls being judged now by hindsight. Sometimes they will be right about that and sometimes not.

We see risks being taken, deliberately, recklessly, or in error, regarding two central matters: whether Horizon has flaws and whether (and how) the prosecutions were unsafe.

But these are a long way from the only examples

The orthodoxy of a litigator's wisdom appears to have been not to lift the rock when misconduct presents.

I said I would talk about drawing the line between lawyers being lawyers and lawyers being unprofessional.

I am not going to finger individual lawyers but I do think we need to be ready to say sometimes it may be worse than unprofessionalism.

It is open to the courts to find some of the behaviour here recklessly or knowingly dishonest. And to be convicted of perverting the course of justice, dishonesty does not need to be shown,

What is needed is, “proof of knowledge of all the circumstances, and the intentional doing of an act which has a tendency, when objectively viewed, to pervert the course of justice.”

An interesting question is whether the orthodoxy of poor conduct here protects the lawyers against an intention to pervert the course of justice.

Critical to the latter will be judgements on the propriety of the steps taken that I have begun to describe above.

Putting criminal law aside, and looking at the professional codes, the main question is whether the lawyers have behaved with necessary honesty, independence, and integrity, as well as more specific rule breaches, particularly around misleading or being complicit in the misleading of the courts or others.

The approach of these lawyers to their professional standards seem to point in one way: lawyers repeatedly regarding the best interest of their client as first and last in the professional canon. It is both wretched and wrong in law. In at least some of these examples, we can see lawyers leaning significantly beyond what can be justified.

They forget what Lord Hoffman referred to in the context of litigation as the lawyers divided loyalty. Or as the courts acknowledged in the case of Lumsdon, that the law requires lawyers with values mindful of independence and standards, “to the great advantage of the rule of law in this country”.

Or as Lady Hale puts it, when thinking about the justification for privilege that has been exploited in this case, “It is in the interests of the whole community that lawyers give their clients sound advice, accurate as to the law and sensible as to their conduct.’”

As Sir Brian Langstaff said of the Infected Blood Scandal, what we seem to have instead is deliberate concealment, a lack of candour, the retelling of half-truths, and the massaging away of risk.

How self-conscious or improper this is, is a question I should leave to the Inquiry over the coming months and as Sir Wyn reports.

That lawyers feel able to do this, across so many years, in all sections of the profession, in the expectation that their judgements would not be called into question tells us a great deal about the adequacy or otherwise of legal education, professional regulation, and the approach of the courts to abuse and other problems that they tend to duck when dealing with cases.

It tells us something too about corporate governance, law, which is largely silent on the role of lawyers, but – given the dramatis personnae here, it also tells us a great deal about the culture of the profession.

It is symptomatic of how adversarial, tactical partisanship trumps justice repeatedly.

Let me evidence the cultural case circumstantially. Law is bought and sold. It is a business, and an interesting question is what is being bought and sold by these businesses. Let me leave you with two clues.

The Chambers of one of the leading barristers involved in the Scandal marketed his services until recently as a steam roller that crushes anything getting in his way. And another leading KC was, again until recently, being sold as someone who can turn “a pile of refuse into something that looks great”.

Steamrollers or a Midas with the brown stuff. Is that what sells? Is that what is bought?

The question for the regulators, the Inquiry, and perhaps even the courts, is how orthodox is this orthodoxy; how honest; how lacking in integrity, and what should we do about it?

I want to end with a word about Scotland. Scottish issues are not front and centre, in the Inquiry inspite of the high number of prosecutions that took place here. Stuart Munro, representing a Scottish core participant, Susan Sinclair, asked a number of important questions when he made submission to the Inquiry.

I want to focus on two I think the Inquiry may struggle to answer.

One is, did the involvement of the Crown Office, the independent public prosecutor, afford greater protection to those facing allegations and, if not, why not?

Another is, did the Crown Office comply with its duty of continuing disclosure when the balloon went up on Horizon prosecutions.

If there is one lesson from the Inquiry it is this: it is the central importanceof independent scrutiny and accountability. No one should be allowed, particularly when questions on such import scale has been raised, to mark its own homework, and particularly not, given the patterns of behaviour set out above, the legal profession.